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Supreme Court, U.S.
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No. 04-389

IN THE

Supreme Court of the United States

HARRY MAYNARD,

Petitioner,

v.

KEITH NYGREN, not individually but as Sheriff of McHenry County, Illinois,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari rests upon two false premises. The first false premise is Petitioner's claim that there is a conflict among the Appellate Circuits concerning the standard for dismissal under Rule 37 of the Federal Rules of Civil Procedure. The Supreme Court announced the standard for a Rule 37 dismissal in *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 1096 (1958), finding that Rule 37 authorizes dismissal of a complaint because of petitioner's non-compliance with pretrial production when it has been established that failure to comply was due to willfulness, bad faith, or any fault of the petitioner. Petitioner cites no cases holding to a different standard and consequently no conflict exists among the Appellate Circuits. Moreover, Petitioner's discovery violation was willful, intentional and occurred in bad faith, consonant with the standard announced in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and therefore dismissal of his case as a sanction under Rule 37 was proper.

The second false premise underlying the Petition for Writ of Certiorari is that the holding of the Seventh Circuit in *Maynard v. Nygren*, 372 F.3d 890 (7th Cir. 2004) is at odds with the Supreme Court's ruling in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). Petitioner fashions his case as one wherein dismissal was granted as a sanction for the singular failure to produce one document during discovery; such is not the case. While it is true that Petitioner did fail to disclose the document during the litigation, he also made false allegations in his complaint and in his amended complaint, filed a false affidavit with the District Court and gave perjured testimony during an evidentiary hearing before the District Court. The totality of

Petitioner's misconduct was extreme and resulted in the proper dismissal of his lawsuit as a Rule 37 sanction. Because Petitioner's misconduct satisfied the standard announced in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the decision of the Seventh Circuit is consistent with the ruling of the Supreme Court in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), and thus the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Relevant Procedural Background

Petitioner, Plaintiff Harry Maynard (hereinafter "Maynard") filed a one-count complaint on June 25, 1998, pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, alleging that the Respondent, Keith Nygren, Sheriff of McHenry County (hereinafter "Sheriff") discriminated against Maynard in violation of the ADA. Doc. 1.[1] The Complaint alleged that the Sheriff violated the ADA when he did not reinstate Maynard to his position as a corrections officer after Maynard's repeated hospitalizations for incapacitating symptoms of multiple sclerosis. *Id.* Maynard subsequently filed an Amended Complaint. Doc. 11.

At the close of discovery, the Sheriff filed a Motion for Summary Judgment. Doc. 54. The trial court granted in part

1. Citations to the Record on Appeal are set forth as follows: Document number from the record on appeal ("Doc. ", followed by exhibit designation (if any) ("Exh.") and page or paragraph number (if any) ("p. " or "¶ "). Citations to the Supplemental Appendix to the Record on Appeal are set forth as ("SA ") and page number ("p. "). Citations to materials contained in the Petitioner's Appendix are set forth as ("App.") followed by the page number ("p.).

and denied in part the Sheriff's Motion for Summary Judgment, holding that no reasonable accommodations were available for the Plaintiff in the jail. Doc. 71, p. 12. The Court denied summary judgment with regard to Plaintiff's allegation of discriminatory discharge, finding that there was "at least a question of fact whether plaintiff was a qualified individual under the ADA." *Id.*

Shortly before trial was to begin, counsel for the Sheriff became aware of an undisclosed piece of evidence, a document that had been given to Maynard by his physician on or about April 4, 1996. Doc. 113, 114; App. 78. The April 4, 1996 document established that at the time Maynard sought reinstatement to his position as a corrections officer at the jail, his treating physician and a consulting neurologist had both concluded that Maynard was not able to perform the essential functions of his job due to his illness. *Id.* The document was never disclosed by Plaintiff or his counsel during the litigation. The Sheriff then filed an emergency motion under Rule 37 for involuntary dismissal and for sanctions. Doc. 113.

The trial court conducted evidentiary hearings pursuant to the Sheriff's Emergency Motion on February 7, 2002 and February 14, 2002. Doc. 139; 140. At the conclusion of the hearing, the trial court found that Maynard made false allegations in his Complaint, that Maynard intentionally and willfully withheld the April 4, 1996 document in violation of discovery rules, that Maynard filed a false affidavit with the Court, and that Maynard gave perjured testimony during the evidentiary hearing. Doc. 140, pp. 140-147, 151; App. pp. 36-37. The Court further found that the April 4, 1996 document was sent to Maynard's counsel by Maynard's physician in February of 1999, but was not included when

Maynard's counsel forwarded Maynard's medical records to counsel for the Sheriff in response to a discovery request. Doc. 140, pp. 141, 150; App. pp. 39-42.

The trial court imposed sanctions for the discovery violation, including dismissal of Maynard's cause of action and the imposition of monetary sanctions against both Maynard and his counsel. Doc. 140, pp. 146-147, 150; App. pp. 37-38, 41-42. The Court awarded the Sheriff attorney's fees incurred in conjunction with the emergency motion, and also awarded the Sheriff Rule 54 costs of litigation. Doc. 140, p. 147; App. pp. 37-38. The Court also imposed a monetary sanction in the form of a fine to be paid to the court. *Id.* The Court ordered that Maynard and his counsel share equally in the monetary sanctions. Doc. 140, p. 150; App. p. 41.

On March 15, 2002, Maynard and his counsel filed a Notice of Appeal. Doc. 134. On August 19, 2002, the District Court entered its order setting the amount of attorney's fees and costs to be awarded to the Sheriff pursuant to the Court's Rule 37 sanction order. Doc. 161; 164. Maynard and his counsel thereafter filed a Notice of Appeal of the trial court's order regarding fees and costs. Doc. 169.

On June 10, 2003, the Seventh Circuit affirmed in part and reversed in part the decision of the trial court. *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003). The Appellate Court affirmed the trial court's imposition of a $3,500 fine and affirmed the trial court's award of attorney fees caused by the discovery failure, but reversed the trial court's sanction as it applied to Maynard's counsel. *Maynard v. Nygren*, 332 F.3d 462, 470-471 (7th Cir. 2003). The Appellate Court then announced a new standard in the Circuit for the weight

of evidence necessary to support a dismissal as a discovery sanction. The Court ruled that there must be clear and convincing evidence of willfulness, bad faith or fault before dismissing a case. *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003). The Seventh Circuit then remanded the case to the District Court to reconsider the evidence in light of the new standard of proof. *Id.* at 469.

On remand, the District Court applied the elevated "clear and convincing" standard to the evidence going to the willfulness of Maynard's discovery violation. App. p. 6. The Court found, by clear and convincing evidence, that Maynard willfully and in bad faith withheld a document from production during discovery, that Maynard knowingly filed false pleadings, and that Maynard had perjured himself in his affidavit and in his testimony before the District Court. App. pp. 9-10. The Court affirmed its sanction of dismissal, the $3,500 fine, the award of attorney's fees going to the emergency motion, and Defendant's Rule 54 costs. App. p. 18. Plaintiff's second appeal followed.

Maynard did not appeal from the District Court's reaffirmation of the monetary sanctions imposed against him; rather, Maynard challenged the District Court's finding by clear and convincing evidence that Maynard had willfully violated the Court's discovery rules, and also challenged the District Court's sanction of dismissal. App. p. 21. The Appellate Court ruled that the District Judge's finding, by clear and convincing evidence, that Maynard had willfully violated discovery rules was not clearly erroneous. App. p. 23. The Appellate Court also held that three of the factors noted by the District Court in its determination that a lesser sanction than dismissal would not be appropriate, including 1) Maynard's continued untruthfulness,

2) Maynard's failure to pay the monetary sanctions imposed against him, and 3) the evidentiary weakness of Maynard's case, were *all* valid reasons supporting the sanction of dismissal in this case. App. p. 24. The Appellate Court affirmed the ruling of the District Court including the decision to dismiss Maynard's lawsuit. App. p. 25.

Relevant Factual Background

Maynard was employed as a corrections officer at the McHenry County jail from January 9, 1992 to September 15, 1997. Doc. 11: ¶¶ 8, 21. During February of 1996, Maynard was hospitalized twice with incapacitating symptoms; subsequent to his hospitalization, Maynard was diagnosed with multiple sclerosis ("MS"). Doc. 52: Exh. F, p. 10; Doc. 11: ¶11. On March 7, 1996, after being discharged from the hospital, Maynard reported to the Sheriff's Office with a release dated March 4, 1996, from his treating physician, Dr. Martinez. Doc. 11: ¶12; App. p. 77. The March 4, 1996 release stated that Maynard could return to work on March 9, 1996, but that Maynard was still under treatment and could have recurrent episodes of weakness or unsteadiness. Doc. 52: Exh. I. Maynard was denied permission to return to work as a jailer based upon the language of the March 4, 1996 release. Doc. 11: ¶12.

After being denied permission return to duty, Maynard complained to Dr. Martinez about the wording of the March 4, 1996 release, and told the doctor that the language in the release stating that he was subject to "recurrent episodes of weakness and unsteadiness," barred his ability to return to work. Doc. 52: Exh. F, p. 20-22. In response, Dr. Martinez expressed doubt about Maynard's ability to supervise prisoners due to his physical condition, but reminded

Maynard that Maynard was scheduled to see Dr. Nager, a neurologist, later that month. *Id.*; Doc. 140, pp. 63-64. Dr. Martinez told Maynard that although he could not release Maynard to full duty without restrictions, he would defer to Dr. Nager's opinion concerning Maynard's ability to return to work. *Id.* Maynard angrily left the doctor's office, slamming the door. Doc. 140: p. 123.

On March 25, 1996, Maynard went to see Dr. Nager, a neurologist that had treated Maynard during his hospitalization in February of 1996. Doc. 52: Exh. K. Dr. Nager explained to Maynard that Maynard had deficits relating to his MS, and expressed doubts and concerns about Maynard's abilities to safely fulfill his duties as a jailer. *Id.* Dr. Nager repeated these comments in a letter to Dr. Martinez dated March 25, 1996. *Id.*; App. p. 79.

On or about March 28, 1996, Maynard inquired of his supervisor, William Maire, Chief of Corrections, about a medical leave of absence. Doc. 114: Exh. F; SA-4; SA-2, pp. 38-40. Chief Maire told Maynard that a physician's statement was required for a medical leave of absence. *Id.* On March 31, 1996, Maynard submitted to the Sheriff a written request for a medical leave of absence, but did not attach a supporting physician's statement. Doc. 114: Exh. G; SA-2, p. 38-40; SA-4. On April 2, 1996, Chief Maire spoke with Maynard and reminded him that he needed a doctor's statement to support his request for a medical leave of absence; Maynard told Maire he would contact his doctor that day. Doc. 114, Exh. F; SA-4.

Dr. Martinez testified that Maynard thereafter contacted Dr. Martinez and asked him to prepare a release that did not state that Maynard could be subject to recurrent episodes of

weakness or unsteadiness. Doc. 114: Exh. H. Dr. Martinez further testified that in response to Maynard's request, on April 4, 1996, he created another report concerning Maynard; the report was left for Maynard to pick up at the doctor's office. *Id.* Circumstantial evidence established that Maynard picked up the release from Dr. Martinez's office. Doc. 132. Maynard never provided a copy of the April 4, 1996 release to the Sheriff.

Thereafter, Maynard was never able to obtain a release stating that he was able to perform the essential functions of his position. Doc. 52: Exh. H. An independent medical examination of Maynard was conducted in January of 1997 at the request of the Sheriff. Doc. 119: Exh. U. The examination was performed by a neurologist named Dr. Sethi, who concluded in light of Maynard's condition, that Maynard may not be able to perform the essential functions of his job all of the time. Doc. 119: Exh. U; App. pp. 84-87. Nine months after Dr. Sethi's examination and after a total of nineteen months away from the workplace, on September 15, 1997, Maynard's employment as a corrections officer was finally terminated due to Maynard's inability to medically establish that he was able to perform the essential functions of his employment position and that he was fit for duty. Doc. 119: Exh. T.

Maynard filed a Complaint in federal court on June 25, 1998, alleging that the Sheriff violated the Americans with Disabilities Act, 42 U.S.C. § 12101, by not returning Maynard to work as a corrections officer. Doc. 1. The Complaint also alleged that Dr. Martinez had refused to change the wording of the March 4, 1996 release. Doc. 1: ¶17. The Complaint failed to acknowledge the existence of the April 4, 1996 release, in which Dr. Martinez had revised the wording of

the March 4, 1996 release. *Id.* Maynard thereafter amended his complaint, and reiterated his allegation claiming that Dr. Martinez refused to revise the wording of the March 4, 1996 release. Doc. 11: ¶18.

At the close of discovery in the case, the Sheriff filed a Motion for Summary Judgment; the Court granted summary judgment in favor of the Sheriff on Maynard's claim that the Sheriff failed to accommodate him, but denied summary judgment as to Maynard's termination finding there was at least a question of fact whether Plaintiff was qualified. Doc. 54; 71, p. 12. Trial was set for February 11, 2001. Doc. 102.

On January 14, 2002, Dr. David Martinez contacted the Sheriff's counsel concerning the Sheriff's subpoena compelling Dr. Martinez' appearance and production of records at trial; Dr. Martinez explained that he was his own record-keeper. Doc. 114: Exh. H. The conversation between Sheriff's counsel and Dr. Martinez included a discussion of the medical records that would be required for trial, including the release provided by Dr. Martinez to Plaintiff on March 4, 1996. *Id.* During the conversation, Dr. Martinez identified a subsequent report that he had prepared for Maynard on or about April 4, 1996, at Maynard's request. *Id.* Dr. Martinez stated that the original copy of the April 4, 1996 report was given to Maynard, and that a photocopy of the April 4, 1996 record was retained in Maynard's chart. *Id.* Because the Sheriff and his counsel were unaware of the existence of the April 4, 1996 document, counsel requested that Dr. Martinez fax a copy of the April 4, 1996 document to counsel's office. *Id.*

After receiving and reviewing the document, the Sheriff filed an emergency motion seeking involuntary dismissal and sanctions based on the discovery of the previously undisclosed document. Doc. 113; 114. The District Court convened an evidentiary hearing on the Sheriff's motion. Doc. 139; 140. Testimony at the hearing established that Maynard requested and picked up the April 4, 1996 report, but never notified the Sheriff of the existence of the April 4, 1996 report, and never provided a copy of the release to the Sheriff during discovery, despite discovery requests for the production of all medical records. Doc. 140: pp. 143-145.

At the conclusion of the evidentiary hearing, the District Court found that Maynard proffered a false affidavit and gave perjured testimony at the hearing. Doc. 140, pp. 144-147; App. pp. 37-38. The Court further found that Maynard's federal complaint contained false statements; that Maynard failed to provide the April 4, 1996 release despite an explicit discovery request for all medical records; and that Maynard's counsel received the April 4, 1996 release but did not include it with the rest of Maynard's medical records when the medical records were forwarded to the Sheriff. Doc. 140, pp. 140-150; App. pp. 36-42. The Court dismissed Maynard's cause of action, assessed a $3,500 fine for the Court's time, awarded the Sheriff his reasonable attorneys fees and expenses associated with the Emergency Motion, and awarded to the Sheriff his Rule 54 costs. *Id.*

In Plaintiff's first appeal, ("*Maynard I*"), the Seventh Circuit acknowledged the standard from *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) and noted the District Court's authority to apply the sanction of dismissal for Rule 37 violations with a finding of willfulness, bad faith or fault, as long as it first considers

and explains whey lesser sanctions would be inappropriate. App. pp. 48-49. However, in *Maynard I*, the Seventh Circuit also determined as an issue of first impression, what burden of proof is necessary to sustain a Rule 37 dismissal based on willfulness, bad faith, or fault. The Seventh Circuit held that, considering the severe and punitive nature of dismissal as a discovery sanction, a court must have clear and convincing evidence of willfulness, bad faith or fault before dismissing a case. App. p. 49. The Appellate Court remanded the case to the District Court for a re-determination based upon the new and elevated "clear and convincing" evidentiary standard announced in *Maynard I.*

On remand the District Court reconsidered the evidence under a clear and convincing standard. Based upon the evidence, the Court affirmed the dismissal of Maynard's lawsuit as a Rule 37 sanction, affirmed the $3,500 fine imposed for the Court's time, affirmed the award of attorney's fees and expenses associated with the Sheriff's emergency motion, and affirmed the award of the Sheriff's Rule 54 costs. Doc. 140, pp. 140-150. The Court also found, based upon Maynard's testimony at the remand hearing, that Maynard had the ability to pay the sanctions that had been ordered by the Court. SA-1, p. 67; App. pp. 67, 70.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioner suggests that a conflict exists among the Appellate Circuits over the appropriate standard for dismissal of a lawsuit as a sanction under Rule 37. Petitioner fails to cite any case from another Appellate Circuit holding a

contrary standard for dismissal under Rule 37 to that expressed by the Court in *Maynard v. Nygren*, 372 F.3d 890 (7th Cir. 2004). *See also Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003); App. pp. 48-49. Instead, rather than to identify specific conflicting decisions between or among the Appellate Circuits, Maynard merely lists the various factors considered by the courts in deciding whether dismissal was appropriate as a discovery sanction. Then Maynard argues that because the various Appellate Courts did not apply all of the same factors in each case that a conflict somehow exists within the Circuits, however, Maynard fails to identify this alleged conflict.

Additionally, most of the cases from differing Circuits relied upon by Maynard, expressly adopted the "willfulness, bad faith or fault" standard reaffirmed by the Supreme Court in *National Hockey League*, 427 U.S. 639, 640 (1976): *See Anderson v. Foundation for Advancement, Education and Employment of American Indians*, 155 F.3d 500, 504 (4th Cir. 1998); *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002); *Maynard v. Nygren*, 332, F.3d 462 (7th Cir. 2003); *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992).

Furthermore, other Appellate Circuits acknowledge and apply the "willfulness, bad faith or fault" standard. *See Local Union No. 251 v. Town Line Sand & Gravel, Inc.*, 511 F.2d 1198 (1st Cir. 1975); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32 (3d Cir. 1979); *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781 (3d Cir. 1974); *Wilson v. Volkswagon of America, Inc.*, 561 F.2d 494 (4th Cir. 1977); *In Re Liquid Carbonic Truck Drivers Chemical Poisoning Litigation M.D.L. Docket No. 252*, 580 F.2d 819 (5th Cir. 1978); *Savola v. Webster*, 644 F.2d 743 (8th Cir. 1981);

Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977); *Wanderer v. Johnston*, 910 F.2d 652 (9th Cir. 1990); *Shearson Loeb Rhodes, Inc. v. Quinard*, 751 F.2d 1102 (9th Cir. 1985); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538 (10th Cir. 1996); *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538 (11th Cir. 1987); (each applying "willfulness, bad faith or fault" standard.

Because no conflict exists among the Circuits concerning the standard for dismissal of a case as a Rule 37 sanction, the Petition for Writ of Certiorari should be denied on this basis.

A. Dismissal is appropriate to redress willful, bad faith non-compliance

The Supreme Court first provided the standard for dismissal under Rule 37 in *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 1096 (1958). In *Rogers*, the Supreme Court held that Rule 37 authorized dismissal of a complaint because of petitioner's non-compliance with . . . pretrial production . . . , when it has been established that failure to comply was due to willfulness, bad faith, or any fault of the petitioner. *Id.* In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640, 96 S. Ct. 2778 (1976), the Supreme Court reaffirmed the "willfulness, bad faith or fault" standard previously announced in *Rogers* as the appropriate standard for a Rule 37 dismissal. The standard for dismissal under Rule 37 announced by the Supreme Court in *Rogers* is binding upon all of the Appellate Circuits cited by Petitioner.

B. Sanctions must be determined on an *ad hoc* basis

The choice of an appropriate sanction must be handled on a case-by-case basis, *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003), and the determination of the correct sanction for a discovery violation is a fact-specific inquiry that the district court is best qualified to make. *Ehrenhaus v. Reynolds,* 965 F.2d 916, 920 (10th Cir. 1992). The district court has primary responsibility for selecting the appropriate sanction under the discovery rules and the Court of Appeals will not reverse the district court's selection absent a clear abuse of discretion. *Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661 (7th Cir. 1996). Each case cited by Petitioner turns not upon the appropriate standard for dismissal under Rule 37, but rather, on the specific factual circumstances of the case under review.

Clearly the decision to dismiss a case under Rule 37 is a fact-dependent process which calls upon the District Court to review the facts of each case on an *ad hoc* basis. The factual and equitable considerations contemplated by the District Court during an *ad hoc* review do not create a conflict among the Circuits in the standard for dismissal under Rule 37 and therefore the Petition for Writ of Certiorari should be denied on that basis.

II. THE DECISION OF THE SEVENTH CIRCUIT IS NOT AT ODDS WITH *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976)

A. Maynard did more than just withhold a document

Petitioner's entire argument is predicated upon the false premise that his case was dismissed solely on the basis of his failure to disclose a one-page document during discovery. Maynard suggests that his singular failure to disclose one document does not constitute the type of "flagrant bad faith" authorizing dismissal under Rule 37 of the Federal Rules of Civil Procedure, as discussed by the Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). However, Maynard severely understates the conduct that resulted in the dismissal of his case by the District Court.

The District Court's factual finding that Maynard requested and received the April 4 report is significant not only because it establishes that Maynard withheld the document, but it also establishes other instances of Maynard's untruthfulness and his non-compliance with the Federal Rules of Civil Procedure. The conduct that ultimately resulted in the dismissal of Maynard's lawsuit included:

(1) Maynard's filing of a false pleading in his original complaint stating that his doctor would not change the wording of the March 4 release, when in fact his doctor did change the wording of the release in the April 4 report.

(2) Maynard's repeating of the false statement in his amended complaint. App. p. 9.

(3) Maynard's failure to disclose the April 4 report at the initiation of his litigation pursuant to Rule 26;

(4) Maynard's failure to disclose the April 4 report despite an explicit discovery request for all medical records; App. p. 36.

(5) Maynard's filing of a perjured affidavit, attesting to the fact that he had never requested or received the withheld document; App. pp. 10, 12, 37.

(6) Maynard's perjured testimony before the District Court during the hearing on the Sheriff's motion for sanctions under Rule 37. App. pp. 10, 12, 37.

The discovery of the April 4 report "opened Pandora's box" to even more instances of Maynard's misconduct throughout the litigation. Based upon his false pleadings, perjured testimony, and willful and continuous violation of discovery, the District Court dismissed his case with prejudice as a sanction under Rule 37. The District Court summarized Maynard's cumulative conduct as "contumacious continuous behavior." App. p. 9.

B. Maynard continued to lie

Moreover, Maynard continued to lie. Maynard not only denied receiving the April 4 document, he denied ever requesting the document. If the Court was to believe Maynard's testimony that he never requested the document, the Court would have to disbelieve Dr. Martinez' testimony that Maynard requested the document, disbelieve Jeanne Gannon's testimony that she typed the letter for Dr. Martinez and put it out for Maynard to pick up, disbelieve Cynthia

Kroncke's testimony that she subsequently copied and mailed the document to Maynard's counsel, and disbelieve Chief Maire's testimony that he had several discussions with Maynard concerning Maynard's request for a medical leave of absence and Maynard's simultaneous need to obtain a report from his physician. Doc. 140.

Based upon the all of the evidence, the District Court quite properly found that Maynard lied about requesting the April 4th letter from Dr. Martinez, and found further that Maynard had requested it as urgent. App. p. 34. The Court found that Maynard had motive to request the release, that he wanted to work and wanted the April 4 letter to release him. App. p. 34. The Court also found that the April 4 letter was picked up by Maynard, contrary to Maynard's testimony. App. pp. 34-35. The Court determined that Maynard gave untruthful testimony under oath in his affidavit and in his testimony when he testified that he did not request or receive the release from Dr. Martinez. App. pp. 9, 37. The Court also determined that Maynard had been untruthful in his pleadings by filing a false amended complaint. App. p. 9.

These findings support the Court's conclusion that the totality of Maynard's conduct merited dismissal of his lawsuit as a sanction, particularly in light of the prejudice to the defendant.

C. Maynard's misconduct resulted in prejudice to the Defendant

The District Court made express findings concerning the prejudice to the defendant as a result of the plaintiff's misconduct. The Court found that it was prejudicial to the defendant that the defendant only became aware of the

plaintiff's discovery violation shortly before trial. App. pp. 12, 36. The Court noted also that defendant's knowledge of the discovery violation came from a potential witness, not from the plaintiff. App. p. 36. The Court also concluded that the discovery violation was willful and in bad faith on the part of the plaintiff, further prejudicing defendant. App. pp. 36-37. Additionally, plaintiff's untruthful testimony under oath in his affidavit and in his testimony prejudiced defendant by denying defendant due process. App. p. 37. Moreover, the District Court found that plaintiff's failure to pay prior ordered sanctions also resulted in prejudice to the defendant, App. p. 7, particularly "since the defendant will never recover the monies spent preparing the case for trial," the Court opined. App. p. 12.

The substantial prejudice to the defendant was a proper factor for the Court to consider in dismissing Maynard's lawsuit as a Rule 37 sanction for Maynard's intentional, willful, and bad faith violation of discovery.

D. The April 4th document is relevant

Maynard argues that the April 4, 1996 report was not relevant because the Sheriff didn't terminate Maynard until September 15, 1997, and the Sheriff did so then in reliance upon the report from Dr. Sethi. However, to accept this argument would be to give Maynard the benefit of his deception. Maynard cannot be allowed to argue that the document he intentionally failed to disclose during discovery was too remote in time to the date Maynard was ultimately terminated to be relevant. Certainly the Sheriff would have acted earlier had Maynard been forthcoming and disclosed the information he had received from his physician.

The District Court cogently realized that the April 4 report was highly relevant to summary judgment and at trial. App. p. 33. The Court found that the document was relevant to plaintiff's condition in March and April of 1996. App. p. 33. It found that the document was very relevant to plaintiff's ability to work and would directly bear on this adversely for the plaintiff. App. p. 33. The Court also noted that if the report had not been produced [by Dr. Martinez] defendant would not have had it to use at trial. App. p. 33. The Court also found that the withheld document would also have been important in taking Dr. Martinez's deposition, however, it was not available at that time because of the discovery violation. App. p. 33. Additionally, the Court held that the April 4th document was important for the summary judgment motion and could also have impacted the Court's ruling on summary judgment. App. p. 33. The Court noted that the April 4th report might also have affected the ambiguous opinion of the County's independent examining physician had he known of the report. App. p. 33. Finally, the Court found that the report was necessary for cross-examination over opinions rendered in the absence of disclosure of the report. App. p. 34.

Because the document was highly relevant during discovery and at trial, Plaintiff's intentional, willful and bad faith nondisclosure of the document merits dismissal of his lawsuit as a Rule 37 sanction. App. pp. 145-146.

E. The sanction of dismissal is necessary to deter similar misconduct

In *National Hockey League*, 427 U.S. 639, 643 (1976), the Supreme Court held that the most severe of sanctions provided by statute or rule must be available to the district

court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. *See also Roadway Exp., Inc. v. Piper*, 447 U.S. 752 (1980). Maynard filed false pleadings, withheld evidence and committed perjury in his affidavit and in his testimony. Under those circumstances, the sanction of dismissal was appropriate not only to penalize Maynard for his misconduct, but also to deter others from following Maynard's example.

Maynard's conduct far exceeded that of merely failing to disclose one document during discovery. Maynard's conduct amounted to willful bad faith. App. p. 37. Maynard's failure to produce the document was intentional and his withholding the document from requested discovery was willful. App. p. 36. In light the District Court's finding of "contumacious continuous behavior" by Maynard, the Court's imposition of dismissal as a Rule 37 sanction is also an important measure to deter other litigants from likewise committing fraud upon the Court. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The ADA requires employers to reasonably accommodate the known disabilities of employees who are qualified individuals with a disability. A qualified individual with a disability is an individual with a disability recognized under the ADA, who can perform the essential functions of the employment position, with or without a reasonable accommodation. 42 U.S.C. § 12111(8); App. p. 66. Maynard withheld a medical record that expressly stated that he was unable to perform the duties of his position because of his condition and that he was currently unable to work. App. p. 78. Maynard withheld evidence that would have established that he was not a qualified individual with a disability in April of 1996, a time when his leave benefits were fully exhausted and his continued inability to work would have resulted in the termination of his employment. Had the Court been aware of the April 4, 1996 report, it would have been determined that Maynard was not a qualified individual with a disability because he was unable to perform the essential functions of his employment with or without an accommodation. App. p. 14.

Maynard's withholding of evidence was compounded by his filing of false pleadings and his perjured testimony in his affidavit and before the District Court. The totality of Maynard's misconduct spans far beyond the intentional failure to disclose a single document, bringing his conduct well into the range of a fraud upon the Court. This in turn wholly deflates Petitioner's suggestion that Maynard's conduct did not rise to the level of willfulness and bad faith as contemplated by the Court in *National Hockey League*, 427 U.S. 639 (1976) and *Rogers*, 357 U.S. 197 (1958).

Respondent has not uncovered one case in any Appellate Circuit where the court has held that filing false pleadings, withholding evidence and repeated perjury did not constitute a sufficient basis for the dismissal of a lawsuit as a Rule 37 sanction. On the contrary, all of the Circuits appear to give proper deference to the "willfulness, bad faith or fault" standard announced by the Supreme Court. Consequently, no conflict exists among the Circuits regarding the proper standard for dismissal under Rule 37.

Because no conflict exists among the Appellate Circuits and because the Seventh Circuit's opinion herein comports to the standards announced in *Rogers*, *supra*, the Petition for Writ of Certiorari should be denied.

WHEREFORE, for the foregoing reasons, Respondent, Sheriff Keith Nygren respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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